protection against discrimination by any foreign carrier against a U.S. carrier. Under the ISP, a foreign carrier must use the same accounting rate with all U.S. carriers.[89/] Furthermore, the foreign carrier must also return a proportionate amount of traffic to all U.S. carriers.[90/] Thus, a foreign carrier cannot favor its U.S. affiliate by reducing its costs, or by increasing its volume.

The Commission's current policy is to grant FACs additional Section 214 authority as long as there are adequate competitive safeguards to prevent abuses:

> the crucial question to be addressed in our review of applications for additional facilities and services to unaffiliated countries is whether the authority requested by TLD poses an additional risk of anticompetitive behavior, and, if so, whether the safeguards we have in effect are sufficient to protect against that risk.[91/]

The competitive safeguards have worked. Nearly two years after approving the TLD acquisition in the TLD Acquisition Order, the Commission authorized TLD to participate in the AMERICAS-1 and COLUMBUS II cable systems in the TLD Columbus II Order. The Commission granted TLD's application over AT&T's vigorous opposition since AT&T could not point to any "additional risk of anticompetitive behavior." The Commission stated that "[u]nder this standard, we find that the public

88/ (... continued)
International Communications Routes, 59 Rad. Reg. 2d (P&F) 982 (1986) ("ISP Policy"), Order on Reconsideration, 2 FCC Rcd 1118 (1987), Order On Further Reconsideration, 3 FCC Rcd 1614 (1988).

89/ See ISP Policy, 59 Rad. Reg. 2d (P&F) 1005 ¶ 54; see also Regulation of International Accounting Rates, 5 FCC Rcd 4948 (1990).

90/ See Regulation of International Accounting Rates, Second Report and Order, 7 FCC Rcd 8040, 8045-46 (1992).

91/ Telefónica Larga Distancia de Puerto Rico, Inc., 9 FCC Rcd 4041, 4044 (footnote omitted) ("TLD COLUMBUS II ORDER").

interest would be served by granting all of these applications. . ."[92] Similarly, AT&T's opposition to a number of other TLD Section 214 Applications have failed to identify any potential (much less actual) competitive abuse not already covered by the Commission's competitive safeguards.

Indeed, AT&T has conceded that it cannot point to any competitive abuses by dropping its opposition to pending TLD facilities applications and electing not to oppose any applications filed after the COLUMBUS II Order.[93] Similarly, AT&T abandoned its opposition to AmericaTel's Section 214 Application for additional authority to 50 countries, including Chile.[94] The Commission granted the AmericaTel application because it found that the existing safeguards are sufficient to protect against competitive abuses.[95]

B. Empirical Evidence Establishes That FACs Do Not Have An Unfair Competitive Advantage Over U.S. Carriers

Neither AT&T nor the NPRM offers any empirical evidence to show that FACs in fact have any unfair competitive advantage that is not eliminated by the Commission's competitive safeguards. If there were any basis for AT&T's professed concern, then one would expect FACs to have a disproportionate market share of traffic on routes to affiliated countries.

[92] Id. at 4044. The Commission withheld approval of TLD's participation in the COLUMBUS II cable segment to Spain because the Executive Branch had not approved a Cable Landing License for this segment. Id. at 4045 n.27.

[93] See Letter from Stephen C. Garavito to William F. Caton 2 (Feb. 3, 1995) (File Nos. ITC-93-091; ITC-94-342; ITC-94-343; ISP-93-002-ND; ISP-93-003-ND; ISP-93-004-ND & ISP-93-005-ND) (stating that "AT&T no longer objects to the grant of the authority sought in these facilities applications"). See also File Nos. ITC-95-164, ITC-95-165 & ITC-95-166 (no AT&T opposition).

[94] AmericaTel, FCC 94-355 (File No. ITC-94-321) (Feb. 15, 1995) at ¶ 1, n.2.

[95] Id. at ¶ 6.

In fact, the evidence shows that this is not the case. In Puerto Rico, AT&T and TLD are the principal carriers of international traffic, comprising about 80% of the market. Of the international traffic carried by both these carriers in 1993, AT&T had approximately 56.7% of the market while TLD had 43.3%.[96] If AT&T's contention that a FAC has an unfair competitive advantage on routes to affiliated countries had any validity, then TLD would have a larger market share on its affiliated routes than it does on its routes to non-affiliated countries. In fact, just the opposite is true.

TABLE 1					
1993 AT&T AND TLD MARKET SHARE ON AFFILIATED ROUTES					
COUNTRY	**TLD MIN.**	**AT&T MIN.**	**PR MIN.**	**TLD SHARE**	**AT&T SHARE**
Spain	622,699	920,662	1,543,361	40.3%	59.7%
Chile	88,208	183,167	271,375	32.5%	67.5%
Argentina	169,585	310,923	480,508	35.3%	64.7%
Venezuela	637,262	1,177,506	1,814,768	35.1%	64.9%
Total Affiliated Traffic	1,517,754	2,592,258	4,110,012	36.9%	63.1%
All International Traffic	22,811,498	29,955,912	52,837,410	43.3%	56.7%

As shown in Table 1, while TLD has a 43.3% share of the market for all countries, its market share is **lower** for service to the four countries where its affiliates have some control of international and local facilities: Spain (40.3%); Chile (32.5%); Argentina (35.3%); and Venezuela (35.1%).[97] Conversely, AT&T's market share is **higher** on

96/ AT&T data comes from its Section 43.61 report for 1993. TLD data comes from its Section 43.61 report and internal documents on international resale traffic. Other carriers are excluded from this analysis because they do not have more than 7% of the market.

97/ This example is used for illustrative purposes only. TLD does not concede that Spain, Argentina, Chile and Venezuela are all affiliated countries under the proposed

(continued ...)

TLD-affiliated routes: Spain (59.7%); Chile (67.5%); Argentina (64.7%); and Venezuela (64.9%) than the market share for all countries (56.7%).

TLD's market share for all four affiliated countries is 36.9%, which is more than 6% below its market share for the total international market. This empirical evidence establishes that TLD has not in fact gotten any unfair advantage from its foreign affiliations.

AT&T has offered neither anecdotal support nor empirical evidence that FACs have any unfair competitive advantage that is not effectively neutralized by the Commission's safeguards. The Commission should insist on convincing hard evidence that its current policy is not working before it abandons the substantial competitive benefits from FAC participation in the U.S. market.

V. THE PROPOSED RULE WOULD HARM COMPETITION IN THE U.S. MARKET FOR INTERNATIONAL TRAFFIC

Section 214 of the Communications Act requires the Commission to permit carriers to enter telecommunications markets and expand their facilities offerings when it will serve the "present or future public convenience and necessity. . . ."[98/] The Commission has regularly interpreted its public interest charge as a requirement to maximize consumer welfare. Paving the way for increased competition through open entry policies has been a hallmark of the Commission's activity in recent years.

The Commission should maintain its open entry policies to maximize competition in the international facilities market. It is particularly important to permit

97/ (... continued)
rule. For example, the Commission might conclude that TI's investment in CANTV is not "significant." Peru is not included in this analysis because it did not become a TLD affiliate until the middle of 1994.

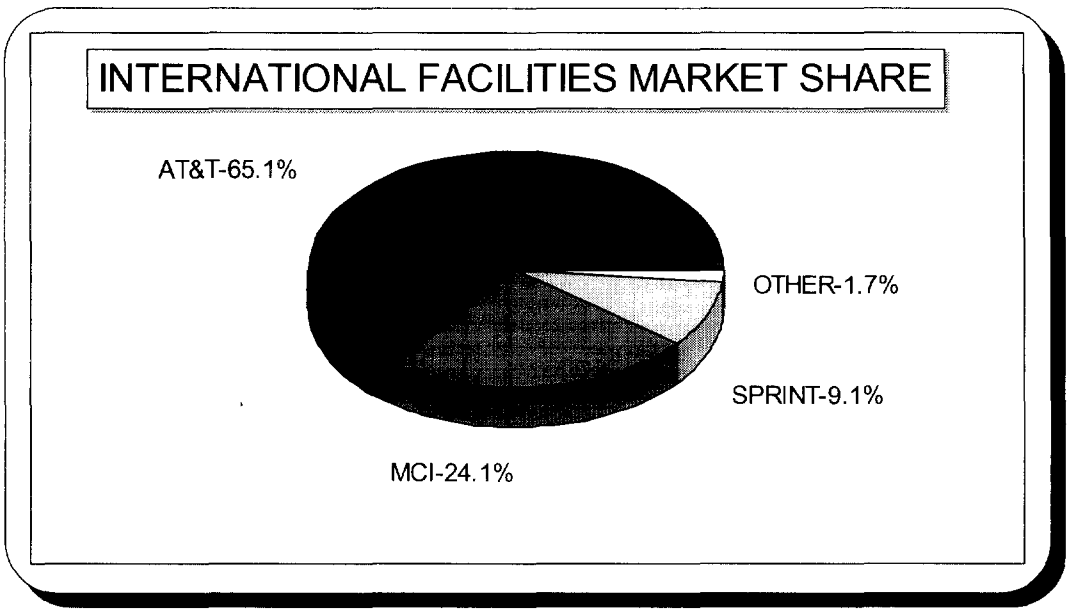
98/ 47 U.S.C. A. § 214(a) (Supp. 1995).

open entry into this market because it is currently a highly concentrated market, and because foreign capital will make this market more competitive. Four out of the five largest carriers already use (or propose to use) foreign capital.

In addition, foreign capital can increase competition in underserved areas of the United States. The experience of TLD provides an excellent example of how foreign-affiliated carriers can benefit underserved consumers by increasing competition.

A. The International Facilities Market Is Highly Concentrated

As the pie graph below demonstrates, the international facilities-based services market is highly concentrated.[99/]



In 1993, the three leading carriers controlled **98.3%** of the international facilities-based market. Less than a dozen other carriers provide the remaining 1.7% of international

[99/] 1993-94 Common Carrier Statistics, Table 4.9, at 204 (1993 revenue data for international facilities-based telephone services).

facilities-based services, many only in local niche markets, such as Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, American Samoa and Micronesia.[100/]

While other carriers provide international services on a facilities-resale basis, they cannot provide significant competition to the three major carriers. As the Commission recognizes:

> The ability to own and control facilities enables a carrier to manage competition by resellers. A reseller has minimal pricing flexibility when it must rely on a competitor that also supplies the infrastructure and underlying basic services which a reseller must use to provide its own services. In addition, the reseller cannot guarantee the quality of its services because the underlying facilities necessary to provide services are not within its control.[101/]

Thus, there are effectively only three significant competitors for international facilities-based services.

B. All Firms, Except for AT&T, Need Additional Capital To Build The GII

Of the top three carriers, MCI and Sprint need foreign capital in order to remain competitive with AT&T. The Commission should be attempting to encourage greater competition in the international market by maintaining its open-entry standard for foreign investment in these two carriers, and in other carriers searching for capital to compete against AT&T, and to build the Global Information Infrastructure envisioned by Vice President Gore and others.[102/]

100/ This three firm concentration of 98.3% in the international facilities-based market is much higher than in the U.S. domestic long distance market. In 1993, these three leading carriers had "only" an 85.9% share of total toll service revenues. 1993-94 Common Carrier Statistics, Table 1.4, at 7.

101/ NPRM ¶ 72.

102/ See, e.g., Vice President Al Gore, Remarks at the International Telecommunications Union Meeting In Buenos Aires, Argentina (Mar. 21, 1994), in BNA Regulation, Economics and Law Text at M-1 (Mar. 22, 1994).

Table 2 below, lists the "total toll revenues" of the five largest carriers in the United States[103/]

TABLE 2	
1993 U.S. TOTAL TOLL REVENUES	
CARRIER	TOTAL TOLL REVENUES
AT&T	$35,731,000,000
MCI	$10,947,000,000
SPRINT	$6,139,000,000
LDDS	$2,222,000,000
C&W	$557,000,000

With the sole exception of AT&T, all of the top five carriers use foreign capital. The second largest carrier, MCI, recently sold a 20% interest to BT for $4.3 billion in order to obtain capital.[104/]

The third largest carrier, Sprint, has a proposed transaction to raise $4.2 billion by selling a 10% interest to France Telecom and an additional 10% interest to Deutsche Bundespost.[105/]

The fourth largest carrier is now LDDS, which includes the former Metromedia/WillTel/IDB businesses. Almost all of the international facilities held by

[103/] 1993-94 Common Carrier Statistics, Table 1.4 at 7. The LDDS total includes revenues from companies it has acquired, including Willtel, Inc., Metromedia and Comsystems Network Services. Revenues from IDB (not shown in Table 1.4) are not included.

[104/] See MCI Communications Corp./ British Telecommunications, 9 FCC Rcd 3960 (1994).

[105/] Sprint Corporation: Petition for Declaratory Ruling Concerning Sections 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, File No. ISP-95-002 (Oct. 14, 1994).

LDDS come from the recently-acquired IDB Communications Group.[106] The LDDS subsidiary, IDB Mobile Communications, Inc., is 50% owned by a foreign carrier, Teleglobe. Therefore, LDDS is also using foreign capital to compete in the international facilities-based market. Furthermore, LDDS, and other U.S. carriers, may need foreign capital if they are to provide significant competition to AT&T, MCI and Sprint.

The fifth largest carrier in the United States is Cable & Wireless Communications, Inc. ("C&W"), a wholly-owned subsidiary of Cable & Wireless plc, a United Kingdom corporation. C&W has an extensive U.S. domestic facilities network. C&W also was the fifth largest carrier of international traffic in the United States in 1993, with $91 million in annual international revenues.[107] However, since C&W is not authorized to provide international facilities-based services, it competes with AT&T and other U.S. carriers solely through international resale services, at a significant cost disadvantage.

Foreign capital is clearly important for development of a competitive international facilities-based marketplace. Four out of the top five carriers in the United States have (or are seeking) foreign investment. Most of these carriers have sought foreign capital in order to compete against AT&T in the interexchange and international markets, as well as other United States and international markets. The FCC should reject the proposed rule because it could limit the ability of even the second, third,

[106] In 1993, IDB had nearly 50 times the amount of revenues from international facilities-based telephone services that LDDS did. IDB also had about 23% of the facilities-based international private line market in 1993. <u>1993-94 Common Carrier Statistics</u>, Table 1.4, at 7.

[107] <u>1993-94 Common Carrier Statistics</u>, Tables 4.9 & 4.10, at 204-05.

fourth and fifth largest carriers to compete against AT&T in the international facilities market.[108/]

C. Foreign-Affiliated Carriers Increase Competition In Important Underserved Markets

In addition to providing critical capital for four of the five largest carriers in the United States, foreign investment also stimulates vital competition for AT&T in important niche markets in underserved areas of the United States. TLD is an important example of this competitive stimulus.[109/]

The Commission has long recognized that the U.S. public interest is best served by promoting vigorous competition in all telecommunications markets. Puerto Rico is no exception.

Historically, all off-island domestic and international service was provided by All America Cables & Radio ("AAC&R"), which AT&T acquired in 1987.[110/] TLD's predecessor, the Puerto Rico Telephone Company ("PRTC") initially applied to enter the off-island market in 1978. However, the opposition of AT&T and its predecessor, AAC&R, delayed TLD's authorization for a full decade. In 1987, the Commission "conclude[d] that competition in the domestic and international off-island markets is

108/ The precise coverage of the rule will depend, in part, on the "affiliation" standard adopted by the Commission. As explained in Part VIIID, below, any rule that covers TI's $112 million investment in TLD should also cover BT's $4.3 billion investment in MCI and the proposed investment of $4.2 billion in Sprint by France Telecom and Deutsche Bundespost.

109/ As explained in Part VII below, the Commission should confirm that any new rule would not apply to carriers that have already entered the market.

110/ AT&T Acquisition of AAC&R/ITTCIVI, 2 FCC Rcd 3948 (1987).

feasible and would promote the public interest.[111] Finally, TLD was authorized to provide competitive, international service in 1988.[112] In 1992, the Commission authorized the TLD acquisition to "encourage competition, lower rates, and bring better service to the public."[113]

Puerto Rican consumers have benefited considerably from TLD's competitive entry. The attached economic study, "Economic Benefits to Puerto Rico From Vigorous Telecommunications Competition," by Glassman-Oliver Economic Consultants, Inc. ("Puerto Rico Competitive Telecommunications Study") (Appendix A), examined the equal access period in Puerto Rico from 1989 to 1994. It established that:

> the total savings to Puerto Rican consumers from post equal access competition in off-island service is at least $568 million. Since TLD is AT&T's major competitor, most of these consumer savings are attributable to TLD's entry.[114]

This savings of $568 million, between 1989 and 1994 amounts to more than $500 for each of Puerto Rico's 1.1 million access lines.

Vigorous competition leads to lower prices, which in turn stimulate the economy. The economic advantages of robust competition are as important in Puerto Rico as they are on the U.S. Mainland. Table 3 below compares the per capita income, unemployment rate and telephone penetration for Puerto Rico with the U.S. national average.

[111] Inquiry Into The Policies To Be Followed In the Authorization Of Common Carrier Facilities To Provide Telecommunications Services Off The Island Of Puerto Rico, 2 FCC Rcd 6600 (1987).

[112] La Telefónica Larga Distancia de Puerto Rico, 3 FCC Rcd 5937 (1988).

[113] TLD Acquisition Order, 8 FCC Rcd at 116.

[114] Appendix A, at i, 17.

TABLE 3		
COMPARISON OF ECONOMIC INDICATORS FOR THE U.S. AND PUERTO RICO		
ECONOMIC INDICATOR	**UNITED STATES**	**PUERTO RICO**
Per Capita GDP	$26,302	$7,200
Unemployment Rate	5.4%	14.2%
Households with Telephones	94.1%	65.8%

The data in Table 3 show that, on average, a U.S. citizen in Puerto Rico has barely one-fourth the per capita income, and is almost three times as likely to be unemployed as a U.S. citizen on the Mainland. In addition, the telephone penetration rate of 65.8 per 100 households in Puerto Rico is barely two-thirds of the national penetration rate of 94.1, and well below the penetration rate in any State on the Mainland. These disparities between Puerto Rico and the U.S. Mainland make the benefits of competition in long distance service (including competition on the price and the quality of the service) all the more essential for Puerto Rico consumers.

Therefore, Puerto Rican consumers can enjoy considerable economic benefits if TLD remains competitive by gaining access to major new international facilities. The Puerto Rico Competitive Telecommunications Study concludes that TLD will be allowed to reduce its costs if it can participate in new international facilities.[115/] However, if TLD were not allowed to reduce its costs by participating in new international facilities, then AT&T would probably not have to pass any cost savings on to its customers.

[115/] Id. at iii, 35-36.

D. The Proposed Rule Would Create Many Competitive Losers And One Competitive Winner

The bottom line is that the proposed rule would create many competitive losers and only one significant competitive winner. The losers include most carriers who need to be able to use foreign capital to expand and compete against AT&T, and all consumers who benefit from a vigorously competitive market place. The only clear winner under the proposed rule is AT&T.

In order for carriers to remain competitive with AT&T they must be able to attract sufficient capital to expand, and they must be able to offer international services on the same facilities-basis. The proposed rule would hurt carriers like MCI and Sprint by limiting their ability to obtain the foreign capital they need to compete against AT&T. The proposed rule would also damage carriers like C&W and TLD, which would like to offer their established U.S. customers competitive international facilities-based services.

The biggest losers under the proposed rule are U.S. consumers. Customers of MCI and Sprint would lose if their carriers cannot attract sufficient capital to compete with AT&T. Customers of carriers like C&W and TLD would face higher prices if these companies are forced to provide international services via resale instead of on a direct facilities-basis. Indeed, the Puerto Rico Manufacturers Association and more than 75 customers of TLD, when faced with the possibility that their carrier would not be able to offer desired international facilities-based services, wrote letters to the Commission expressing the desire that their chosen carrier be allowed to expand its international facilities and decrease its costs (Appendix B).

Even AT&T's customers would be hurt by the proposed rule. Effective competition from MCI, Sprint, C&W and even TLD provide competitive pressures on

AT&T. As the NPRM itself acknowledges,[116] entry by the FACs would benefit all consumers by increasing competition. The competitive pressures added by the FACs' facilities-based services will serve as an important constraint on the prices of all U.S. carriers.

The only big winner under the proposed rule is AT&T. Its principal competitors, MCI and Sprint, would be prevented from (or penalized for) obtaining needed foreign capital to compete effectively. Potentially significant competitors such as C&W and TLD would not be able to compete effectively if they face significantly higher costs because they are denied access to international facilities on an ownership basis. As a direct result, AT&T would be able to raise its rates and increase its profit margins.

VI. ANY NEW RULE SHOULD COVER AT&T

The proposed rule would not apply to AT&T and other U.S. carriers with investments in foreign affiliates that provide international facilities-based services. The NRPM offers no justification for AT&T's exemption. Subjecting AT&T to the same rule as other carriers would further the stated goals of the NPRM at least as much as covering other carriers. The failure of the proposed rule to cover AT&T makes it clear that the real purpose of AT&T's proposed rule is to favor AT&T. This favoritism to AT&T serves no rational basis -- beyond protecting AT&T's interests -- and would violate the Equal Protection Clause.

116/ NPRM ¶ 81.

A. AT&T's Worldwide Interests

AT&T has substantial investments in telecommunications entities throughout the world. It has equity investments in international facilities based carriers in Canada,[117] the Ukraine[118] and Venezuela.[119]

In addition, AT&T has certified, pursuant to 47 C.F.R. § 63.01(r) (1994), that it is affiliated with foreign carriers in a number of other countries, including Australia, Hong Kong, Israel, Jamaica, Japan, Russia (pending) and the United Kingdom.[120] While AT&T disclosed most of these affiliations in a recent Section 214 application,[121] it is impossible to determine whether these affiliates provide international facilities-based voice services covered by the proposed rule because AT&T has apparently failed to disclose the precise nature of the affiliations, or the businesses they are engaged in, as required by Section 63.11 of the Commission's rules.[122]

117/ AT&T has a 20% interest in Unitel Communications, Inc., which provides local, domestic long distance and facilities-based international services to the United States (which constitutes approximately 70% of Canada's market for international calls).

118/ AT&T has a 19.5% interest in UTEL, a joint venture that includes the Ukraine government, Deutsche Bundespost Telekom and PTT Telecom Netherlands. UTEL provides local and international facilities-based services.

119/ AT&T has a small equity stake in CANTV, the exclusive Venezuelan provider of local and international services. In addition, AT&T signed a letter of intent in November 1994 with Grupo Alfa to offer national and international communications services in Mexico. The new venture "will invest roughly $1 billion over the next four to six years." Latin American Telecom Report at 3 (Dec. 15, 1994).

120/ See AT&T Application To Activate And Operate Capacity In The U.S.-Cuba No. 7 Cable System, File No. ITC-95-188 at 6 (1995).

121/ AT&T's affiliation disclosure omitted at least its investment in the Venezuelan international facilities-based carrier.

122/ ITS has been unable to locate any AT&T § 63.11 filings at the Commission. In a March 7, 1995 letter to Stephen Garavito of AT&T, TLD requested copies of AT&T's filings. AT&T has refused to respond to this request.

In addition to these AT&T equity interests, AT&T has formed and retains a 40% equity stake in WorldPartners™, a joint venture of foreign telecommunications carriers which provide international voice and data services including private line, frame relay and virtual network services.[123] For example, WorldSource™ global network services will allow employees at multinational companies to dial colleagues at any of the firm's international subsidiaries using only four or five-digit extensions, avoiding the need for 14-digit international codes.

Other equity holders in WorldPartners include Kokusai Denshin Denwa of Japan, Singapore Telecom and Unisource.[124] The non-equity members of WorldPartners include: Telstra of Australia, Hong Kong Telecom, Korea Telecom, Unitel of Canada, and New Zealand Telecom International.[125] By taking advantage of the membership of telecommunications carriers in countries around the world, WorldPartners™ has a significant competitive advantage in the market for global networks.

The NPRM's characterization of WorldPartners™ as a mere "co-marketing arrangement"[126] understates the significance of AT&T's global venture.

123/ Under Section 43.51 of the Commission's rules, AT&T is required to file a co-marketing agreement, such as WorldPartners™, with the Commission. 47 C.F.R. § 43.51 (1994); NPRM ¶ 63. ITS has been unable to locate AT&T's WorldPartners™ agreement or materials at the Commission. Further, in a letter to Stephen Garavito of AT&T (Mar. 7, 1995), TLD requested a copy of any WorldPartners™ materials filed with the Commission. AT&T has not responded to TLD's request.

124/ Unisource is a joint venture of PTT Telecom Netherlands, Sweden's Telia and Swiss Telecom PTT. Unisource is currently negotiating with TE to join Unisource as an equal shareholder.

125/ AT&T has also recently announced that Nippon Telegraph and Telephone would also align with AT&T to provide similar telecommunications services to international businesses. Wall St. J., Mar. 1, 1995, at B2.

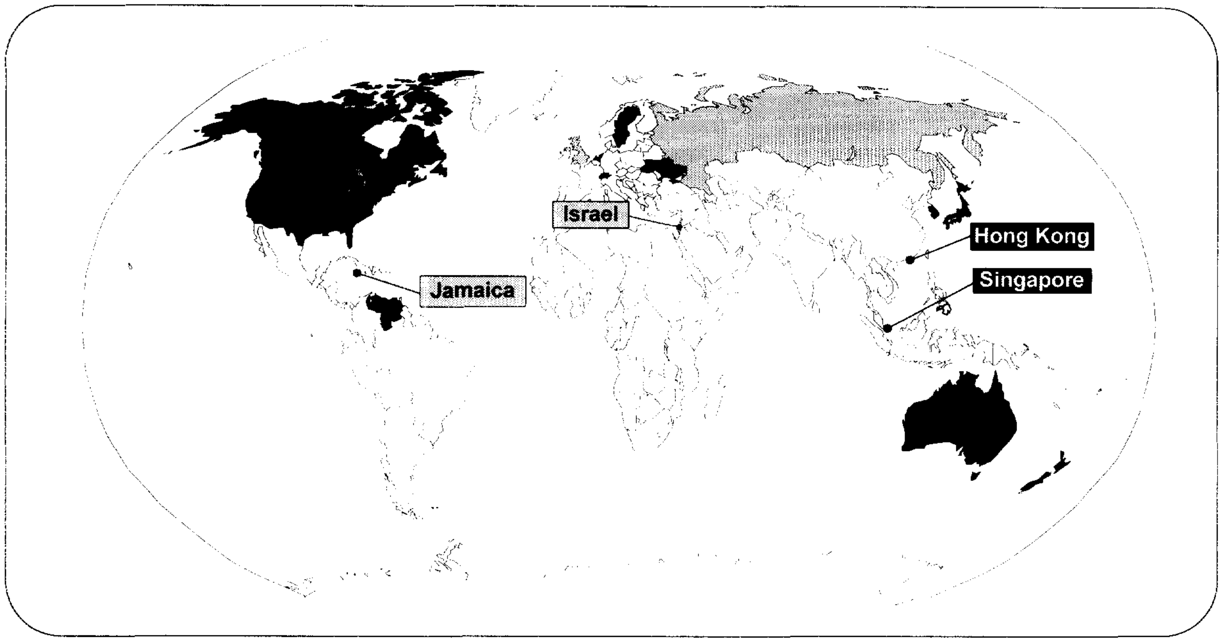
126/ NPRM ¶ 63.

AT&T and its foreign partners will have an equity stake in WorldPartners™, which will apparently have a direct financial stake in the global networks that are established. They will have a strong incentive to establish these global networks on an exclusive basis through WorldPartners™ because of their financial stake in this entity, and because the success of this venture depends on all the members of WorldPartners™ steering their customers to this program. Therefore, AT&T's WorldPartners™ presents the same threat to competition as the direct investments made by competing carriers.

Through its direct investments in foreign national carriers that provide international facilities-based services and its 40% equity stake in WorldPartners, AT&T has a tremendous worldwide competitive reach that certainly exceeds that of TLD or any other carrier. This is illustrated in the map below where countries with direct AT&T investments and countries that participate in WorldPartners are shown in black,[127/] and countries with which AT&T has certified affiliations with foreign carriers are shown in gray.[128/]

127/ These countries include the United States, Canada, Ukraine, Venezuela, Japan, Australia, New Zealand, Hong Kong, Singapore, Switzerland, Sweden, the Netherlands and South Korea.

128/ These countries include Russia, the United Kingdom, Israel and Jamaica.



B. The Commission's Exclusion Of AT&T From The Rule Would Be Protectionist, And Would Violate The Equal Protection Clause

The stated goals of the proposed rule are to: (1) promote effective competition in the global market; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets.[129/] Yet the proposed rule would not cover AT&T's equity investments in foreign carriers that provide international facilities-based services, or in WorldPartners. The NPRM offers only the conclusory statement that "[w]e do not believe that our goals would be furthered by requiring an effective market access showing when a U.S. carrier acquires an ownership interest in a foreign carrier."[130/]

The Commission does not provide any basis for this discriminatory treatment in favor of AT&T. While the Commission would consider the foreign

129/ NPRM ¶ 1.

130/ NPRM ¶ 50.

investments in carriers like MCI and Sprint, and the foreign activities of the affiliates of TLD and C&W, it would turn a blind eye to AT&T's activities.

This disparate treatment of AT&T and TLD is perhaps best seen in the case of Venezuela. Both AT&T and TLD (and GTE) own investments in CANTV, which is the exclusive provider of international facilities-based services in Venezuela.[131/] In addition to their ownership interests, AT&T originated nearly 90 times more traffic to Venezuela than TLD did in 1993.[132/]

If the Commission believes that applying an "effective market access" test to TLD's affiliated interest in Venezuela would serve the Commission's goals, then there is also every reason to assume that Commission's goals would similarly be furthered by applying this test to AT&T's interests as well. For example, given AT&T's equity ownership, world presence and traffic share, AT&T should be able to apply at least as much pressure as TLD (or TI) on the Venezuelan government to promote global competition by permitting competition for international facilities-based services.[133/]

Similarly, AT&T's affiliation with CANTV presents at least as great a threat of competitive abuse as TLD's. Indeed, since AT&T has almost 90 times as much traffic with Venezuela as TLD does, the Commission should be far more concerned about the possibility of AT&T abusing its affiliation than TLD. Although the Commission states that it would regulate AT&T as a dominant carrier (which it already does without

[131/] Although the Commission might conclude that Venezuela is not a "primary" market because the ownership interests of AT&T and TLD are not "significant," GTE's 51% interest in VenWorld, which owns 40% of CANTV, and AT&T's interests in Unitel and UTEL would probably be considered "significant," if U.S. investments were covered by the rule.

[132/] In 1993, TLD originated 637,262 minutes from Puerto Rico, while AT&T originated (and billed in the United States) 56,935,165 minutes from all U.S. locations. See AT&T's § 43.61 filings.

[133/] NPRM ¶ 50

regard to AT&T's investment in Venezuela) and consider imposition of other competitive safeguards, the Commission provides no basis for concluding that dominant treatment and competitive safeguards obviate the need for a new Section 214 test for AT&T, but not for MCI, Sprint or TLD.

In addition, AT&T's substantial investments in a Canadian carrier (Unitel) and a Ukrainian carrier (UTEL) are no different than TI's investment in Chile, Argentina or Peru. Subjecting AT&T to the "effective market" access test is at least as likely to increase global competition and convince foreign governments to change their telecommunications policies as applying the proposed rule to TLD would.

If the Commission is really concerned about competition in the market for global networks, then it should certainly also apply any new rule to AT&T, which created WorldPartners™ to give it a competitive advantage over other U.S. carriers in developing global networks. The equity stakes held by AT&T and its partners, as well as the joint marketing arrangements that AT&T and its equity and non-equity partners have agreed on, create powerful incentives for the foreign carriers to join with AT&T instead of other U.S. carriers to create these global networks.[134/]

A simple comparison of the volume of AT&T's traffic to countries where it has invested in international facilities-based carriers and where its WorldPartners™ carriers are located with the volume of traffic that TLD has with its affiliated countries,

[134/] The issue should not be whether the WorldPartners™ agreement requires foreign carriers to deal with AT&T on an exclusive basis, NPRM ¶ 63, but whether it gives them incentives to do so. There are a number of potential issues raised by WorldPartners™. For example, the incentives for foreign companies to use WorldPartners™ could conflict with the proportionate return requirement in the ISP.

shown in Table 4, demonstrates that AT&T's affiliations poses a far greater threat than TLD's to competition in the global market.[135/]

TABLE 4		
COMPARISON OF AT&T AND TLD AFFILIATED TRAFFIC (1993)		
COUNTRY	AT&T AFFILIATED TRAFFIC (MINUTES)	TLD AFFILIATED TRAFFIC (MINUTES)
CANADA	1,458,241,019	0
UKRAINE	7,637,906	0
VENEZUELA	55,712,871	637,262
AUSTRALIA	76,186,061	0
JAPAN	223,838,531	0
HONG KONG	72,319,236	0
NETHERLANDS	68,801,141	0
NEW ZEALAND	14,292,866	0
SINGAPORE	31,884,215	0
SOUTH KOREA	129,370,509	0
SWEDEN	39,101,383	0
SWITZERLAND	63,789,791	0
ARGENTINA	0	169,585
CHILE	0	88,208
SPAIN	0	622,699
TOTAL AFFILIATED TRAFFIC	2,241,175,529	1,517,754
ALL INTERNATIONAL TRAFFIC	7,234,974,628	22,881,498

135/ For purposes of this illustration only, TLD's affiliated countries include Spain, Argentina, Chile, Spain and Venezuela. AT&T's affiliated countries include those with a direct investment in an international facilities-based carrier (Canada, Ukraine and Venezuela) and those that are members of WorldPartners (Australia, Japan, Hong Kong, Netherlands, New Zealand, Singapore, Sweden, South Korea and Switzerland). AT&T data comes from its § 43.61 report for 1993.

TLD sends approximately 1.5 **million** minutes to its "affiliated" countries. By contrast, AT&T sends 2.2 **billion** minutes to its affiliated countries, or more than **1475 times** more traffic than TLD. It is not just that AT&T is a much larger carrier than TLD. It has affiliates on more critical routes than TLD does. While TLD's traffic to affiliated countries accounts for only 6.5% of its international traffic, AT&T's traffic to affiliated countries includes more than 30% of all of its international traffic. Should competing carriers and the Commission be more concerned about the potential competitive harm from TLD or AT&T?

The proposed rule clearly treats AT&T differently from other carriers, including MCI, Sprint, TLD, and C&W. Neither AT&T nor the NPRM articulate any rationale for this disparate treatment. Foreign governments will view this disparate treatment as protectionist action which favors AT&T. U.S. courts will view this discrimination as a violation of the Equal Protection Clause.[136/]

VII. THE COMMISSION SHOULD CONFIRM THAT ANY NEW RULE APPLIES ONLY TO NEW ENTRANTS

A. The NPRM States That Any New Rule Would Apply To New Entrants

The NPRM consistently states that any new rule would apply only to new entrants. For example, the purpose of the NPRM is to consider modifying the Section 214 public interest standard for foreign carriers seeking "to **enter** the U.S. market to provide international facilities-based services."[137/] The NPRM "tentatively concludes that we should modify our **entry** standard for international facilities-based

[136/] See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational").

[137/] NPRM ¶ 2 (emphasis added).

carriers. . . ."[138] The NPRM declares that any proposed rule will apply to "new foreign carrier **entrants**."[139]

When articulating the proposed rule, the Commission is careful to state that: "[w]e propose to apply any **entry** standard adopted in this rulemaking for international Section 214 applications only to those potential **entrants** that are 'affiliated' with a 'foreign carrier.'"[140] The NPRM's uniform reference to "entry standard," and "potential entrants" instead of all "foreign-affiliated carrier applicants" makes it clear that any proposed rule would cover only new entrants, not foreign-affiliated carriers the Commission has already authorized to enter the U.S. market. The Commission should confirm explicitly what the rule implies.

B. Competition In The U.S. Market Would Be Decreased If The New Rule Were Applied To Existing Foreign-Affiliated Carriers

The Commission will attain its primary goal of "promot[ing] effective competition,"[141] by permitting existing foreign-affiliated carriers in the U.S. market to offer their customers new and expanded services. Carriers can only remain competitive by continuing to provide their customers the most advanced and efficient services available. A carrier that cannot expand its service offerings is a carrier that will not survive in the marketplace.

It is particularly important that the Commission permit TLD to continue to expand its provision of facilities-based international services. If TLD is not permitted to

[138] NPRM ¶ 38 (emphasis added).

[139] NPRM ¶ 46 (emphasis added). See also, NPRM ¶ 43 (the new rule would apply "[i]f a foreign carrier desires to enter the U.S. basic international facilities-based market either directly or through affiliation with an authorized carrier").

[140] NPRM ¶ 52 (emphasis added).

[141] NPRM ¶ 1.

offer new facilities-based services, then it will not be able to continue to act as a competitive check on AT&T. Application of the new rule to existing foreign-affiliated carriers like TLD would eliminate "effective competition."

C. The New Rule Should Not Apply To Existing Foreign-Affiliated Carriers That Have Made Investments In Reliance On The Commission's Decisions

Some FACs have made substantial investments in U.S. carriers based on existing FCC policies. For example, TI invested $112 million in TLD based on the Commission's decision in the TLD Acquisition Order. When TI closed its $112 million transaction, TI believed that TLD would be able to expand its international facilities authorizations as long as that expansion did not create any additional risks of competitive abuses that were not adequately covered by Commission safeguards. The Commission subsequently confirmed TI's interpretation of the TLD Acquisition Order:

> we agree with TLD that the crucial question to be addressed in our review of applications for additional facilities and services to unaffiliated countries is whether the authority requested by TLD poses an additional risk of anticompetitive behavior, and, if so, whether the safeguards we have in effect are sufficient to protect against that risk.[142]

It is well settled that, under the Fifth Amendment, the government must reimburse parties for deprivations of "reasonable investment-backed expectation[s]." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984). Even governmental action which "substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" Penn Centr. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

The proposed rule would apply a vastly different rule to future TLD "applications for additional facilities and services to unaffiliated countries." It could

[142] TLD COLUMBUS II Order, 9 FCC Rcd at 4044 (footnote omitted).

seriously diminish TI's "reasonable investment-backed expectations" of TLD's ability to expand its international facilities-based services that were created by the Commission's TLD Acquisition Order. Accordingly, any new rule should not apply to FACs that have already been authorized to provide international facilities-based services.

VIII. IF ANY RULE IS ADOPTED, THE COMMISSION SHOULD MODIFY THE PROPOSED RULE

As set forth above, TLD does not believe that any new rule should be adopted. However, if a new rule is adopted by the Commission, the following changes should be made.

A. The Proposed Rule Should Cover Entry Only On Routes To Affiliated Countries

As the Commission recognizes, the potential for any unfair competitive advantage or abuse is based on a carrier's presence on both ends of a particular international route. The Commission's concerns that FACs would obtain competitive advantages over other U.S. carriers on end-to-end routes and global networks only applies to routes where a FAC provides international facilities-based services on both ends of a route. Therefore, the application of any "effective market access" test should at most be limited to routes between the United States and the affiliated countries. Indeed, the Commission's dominant carrier policy applies this distinction. FACs are regulated as dominant carriers on routes to affiliated countries, and nondominant carriers on routes to unaffiliated countries.[143/]

As the Commission recognizes in the context of maintaining an open entry policy for FACs for domestic interexchange service,

[143/] See 47 C.F.R. § 63.10(a)(1-4) (1994).

> A foreign carrier whose U.S. affiliate provides **domestic interexchange service** may not use its bottleneck facilities to disadvantage unaffiliated U.S. interexchange carriers where there is no direct interconnection of those facilities to the foreign carrier's **U.S. interexchange facilities**.[144]

The same logic applies with equal force to international facilities-based service to unaffiliated countries:

> A foreign carrier whose U.S. affiliate provides **international facilities-based services to unaffiliated countries** may not use its bottleneck facilities to disadvantage unaffiliated U.S. interexchange carriers where there is no direct interconnection of those facilities to the foreign carrier's **facilities for services to unaffiliated countries**.

Most FACs will be able to provide competitive benefits for the overwhelming proportion of their traffic which goes on unaffiliated routes. For example, 93.5% of TLD's 1993 international traffic was on unaffiliated routes.

Applying an "effective market access" test to unaffiliated countries would mean that the public would lose the competitive benefits that flow from an open entry policy on routes where there is not even a theoretical basis for anticompetitive effects, much less any demonstrated evidence that anticompetitive conduct has occurred. TLD's customers could lose these important competitive benefits on the 93.5% of their international calls to unaffiliated countries.

The Commission recognizes that, for domestic interexchange services, the FAC's inability to use affiliates' foreign bottleneck facilities,

> combined with the competitive benefits of our longstanding open entry policy for **domestic service**, and the administrative burden of regulating entry, to outweigh any anticompetitive effects that might occur as a result of

144/ NPRM ¶ 81 (emphasis added).